Supreme Court, U.S.
FILED

No. 09-1383 MAR 20 2010

OFFICE OF THE CLERK

In the Supreme Court of the United States

EDWARD W. FISHER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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May 10, 2010

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QUESTION PRESENTED

There is a split among the Circuits as to the proper review standard that a Circuit Court should use to determine if a request for release pending appeal presents a "substantial question" of law or fact under the Bail Reform Act of 1984. Most Circuits define a substantial question as a "close question". The Ninth Circuit and arguably the Third Circuit define the term "substantial question" more broadly by using the same definition that the phrase received in the prior incarnation of the standard for bail pending appeal, i.e., as an issue that is "fairly debatable". Assuming that a defendant meets the character requirements of the Bail Reform Act, the question presented in this Petition is:

Given Eighth Amendment values, whether a request for release pending appeal should be granted upon a defendant's proof that his appeal will raise a "fairly debatable" issue?

PARTIES TO THE PROCESS AND RULE 29.6 STATEMENT

Petitioner is Edward Fisher, an individual.

Respondent is the United States of America.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCESS AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

CITATIONS OF OPINIONS AND ORDERS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION ... 6

A. Introduction 6

B. The History of Bail Pending Appeal 8

C. Courts Divide Over the Meaning of "Substantial Question" in the 1984 Bail Act 10

D. This Court Should Interpret a "Substantial Question" as a "Fairly Debatable" Issue . . 11

CONCLUSION 12

APPENDICES:

Appendix A: Order of the Sixth Circuit Dated January 14, 2010 Denying Defendant's Motion for a Stay Pending the Filing of a Petition for Writ of Certiorari 1a

Appendix B: Order of the Sixth Circuit Dated December 23, 2009 Denying Defendant's Motion for Bond Pending Appeal 3a

Appendix C: Opinion and Order of the District Court Dated November 19, 2009 Denying Defendant's "Motion for Bond Pending Appeal" 6a

Appendix D: Relevant Provisions from the 1984 Bail Reform Act, 18 U.S.C. § 3143(b)(1)(B) 13a

Appendix E: U.S. Const. amend. VIII . . . 16a

TABLE OF AUTHORITIES

Page

Cases

D'Aquino v. United States,
180 F.2d 271 (Douglas, Circuit Justice, 9th Cir. 1950) 9, 10

United States v. Affleck,
765 F.2d 944 (10th Cir. 1985) (*en banc*) 7

United States v. Austin,
768 F.2d 302 (10th Cir. 1985) 8

United States v. Barbeau,
92 F. Supp. 196 (D. Alaska 1950) 9

United States v. Barker,
11 F.R.D. 421 (N.D. Cal. 1951) 9

United States v. Bayko,
774 F.2d 516 (1st Cir. 1985)) 7

United States v Bilanzich,
771 F.2d 292 (7th Cir. 1985) 7

United States v. Giancola,
754 F.2d 898 (11th Cir. 1985) 10, 11

United States v. Glazer,
14 F.R.D. 86 (E.D. Mo. 1952) 9

United States v. Handy,
761 F.2d 1279 (9th Cir. 1985) 7, 8, 11

United States v. Miller,
753 F.2d 19 (3rd Cir. 1985) 10

United States v. Perholtz,
836 F.2d 554 (D.C. Cir. 1988) 7

United States v. Pollard,
778 F.2d 1177 (6th Cir. 1985) 5, 7

United States v. Powell,
761 F.2d 1227 (8th Cir. 1985) (*en banc*) 7

United States v. Randell,
761 F.2d 122 (2nd Cir. 1985) 7

United States v. Steinhorn,
927 F.2d 195 (4th Cir. 1991) 7

United States v. Stephenson,
110 F. Supp. 623 (D. Alaska 1953) 9

United States v. Valera-Elizondo,
761 F.2d 1020 (5th Cir. 1985) 7

United States v. Warring,
16 F.R.D. 524 (D. Md. 1954) 9

Constitutional Provisions, Statutes and Rules

United States Constitution, Amendment VIII 1

18 U.S.C. §371 2

18 U.S.C. §3143(b)(1) 1

28 U.S.C. §1254(1) 1

Fed. Rules of Crim. P. 46(a)(2) 9

Fed. Rules of Evidence 106 4

Fed. Rules of Evidence 803(5) 4

Fed. Rules of Evidence 803(6) 4

Treatises

William F. Duker, *"The Right to Bail: A Historical Inquiry"*, 42 Alb. L. Rev. 33 (1978) 8, 9

Doug Keller, "Resolving a 'Substantial Question': Just Who Is Entitled to Bail Pending Appeal Under the Bail Reform Act of 1984?", 60 Fla. L. Rev. 825 (September 2008) 6*

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* Mr. Keller's Law Review Article is, in fact, drawn upon verbatim and paraphrased in large measure throughout the Petition.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Edward Fisher ("Fisher") respectfully petitions for a writ of certiorari to review the order of the Sixth Circuit which denied the Petitioner's motion for bond pending appeal.

CITATIONS OF OPINIONS AND ORDERS BELOW

The Orders of Justice Stevens for a Single Justice Stay and of the Sixth Circuit denying Petitioner's Motion for Stay Pending the Filing of a Petition for Writ of Certiorari and for Bond Pending Appeal (Apps. A, B) are unreported. The District Court's Order denying the Petitioner's Motion for Bond Pending Appeal (App. C) is also unreported.

JURISDICTION

The Sixth Circuit Court entered its Order denying Petitioner's Motion for Bond Pending Appeal on December 23, 2009. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment VIII. (App. E.)

18 U.S.C. § 3143(b)(1). (App. D.)

STATEMENT OF THE CASE

Edward Fisher was general counsel to a professional employer organization, Simplified Employment Services, Inc. ("SES") from 1994 to 2001. He had no ownership interest in the company and no responsibility for tax reporting or accounting.

On August 9, 2006, Fisher was charged in a two count indictment of Conspiracy to Defraud the IRS in violation of 18 U.S.C. §371 and Conspiracy to Commit Bank Fraud in violation of 18 U.S.C. §371. Trial took place from June 17, to July 3, 2008. Fisher was found guilty of tax fraud and acquitted of bank fraud.

Count One of the Indictment alleged a conspiracy to defraud the IRS by executives of SES during the time period from 1997 to 2001. SES administered payroll for its client companies, including making payments of employment taxes. The Indictment alleged that beginning in 1997, the company CEO, COO, and CFO began making employment tax underpayments and failed to file required employment tax returns, IRS Form 941s. It also alleged that beginning in late 1999, the company began filing false employment tax returns, understating the taxes owed by showing the actual amounts owed to be equal to the amount it had previously paid years earlier. The Government claimed the total loss amount was about $51,000,000. There was no evidence produced at trial that Fisher knew the cause of the prior tax underpayments or that Fisher participated in any way in filing false tax returns.

The Government claimed that Fisher, as SES general counsel, joined the conspiracy in December

1999 when he learned of the CEO's intention to file false employment tax returns. The Government argued that Fisher acted to further the conspiracy in May 2000 by hiring McGee Grigsby, a tax attorney from the Washington, D.C. office of Latham & Watkins, LLP, to negotiate a resolution of SES's employment tax problem with the IRS but failed to report to Grigsby and the IRS that the cause for the SES tax underpayment in prior years was deliberate rather than unintentional error. Fisher was, therefore, indicted for allegedly failing to advise the IRS of SES's illegal activity.

Although the gist of the indictment and the government's theory was that Fisher had a duty to report that SES was involved in illegal tax activity to Grigsby and the IRS, the District Court refused to answer two questions submitted by the jury during deliberations that were integral to that issue. Specifically, the jury asked: whether "attorney/client privileges apply to Edward Fisher" as in-house counsel for SES and whether an attorney who "learns of illegal activities by his employer . . . is legally required to report this to the appropriate authorities". Counsel for Fisher requested the trial court to answer the questions "yes" and "no" respectively, but the trial court refused to answer the questions at all on the grounds that the answers were "potentially complicated". Instead it admonished the jury to refer to their original instructions which were silent on the issues of attorney/client privilege and that there is no duty on anyone or an attorney in particular to disclose illegal activity of another. Within 30 minutes of the trial court's refusal to provide further instructions – the jury returned with a verdict convicting Fisher of conspiracy to commit tax fraud.

During the trial, Grigsby was the key government witness. The Government argued Fisher joined the conspiracy to defraud the IRS by withholding information from Grigsby and thereby the IRS. However, Grigsby testified at the trial that he had no memory of what he was told by Fisher or anyone else at SES. Because of Grigsby's claimed memory loss, the Government had him read from excerpts of contemporaneous notes he made while providing legal services to SES as past recollections pursuant to FRE 803(5).

In response, Fisher asked to have 17 exhibits that were Grigsby's notes admitted as evidence pursuant to FRE 803(6) as records of regularly conducted activity or under FRE 106 under the rule of completeness. The Government and the defendant laid the proper foundation under FRE 803(6) as business records of a regularly conducted activity. The defendant argued that admission of the 17 exhibits was critical as Grigsby had no functional memory of the SES conversations or events and his notes were the only evidence of what Grigsby was told by Fisher and others. Although the trial court permitted Grigsby's notes to be read to the jury as past recollection recorded, it refused to admit Fisher's 17 exhibits under FRE 803(6) finding *sua sponte* that Grigsby's notes were untrustworthy because of the possibility that litigation could perhaps follow from the IRS audit.

The incongruous result of these decisions was that the government was allowed to introduce three exhibits that the trial court determined were untrustworthy as notes prepared in anticipation of litigation against Fisher – while denying Fisher the opportunity to admit exhibits of the same ilk by the

same author to rebut the Government's proofs. Defendant contends that either all or none of the Grigsby exhibits should have been admitted. As Grigsby's notes were the only record and evidence of what Grigsby actually knew at the time – the omission of 17 exhibits written by Grigsby was critical to the defense that Grigsby was fully informed by Fisher and others.

Fisher raised these issues and others in his Motions for Bond Pending Appeal to the District Court and the Sixth Circuit. The District Court denied Fisher's Motion for Bond on Appeal on November 19, 2009. See App. C. The District Court found that there was "no suggestion that defendant might flee or pose a danger if granted bond", but denied the motion on the basis that it did not present a "substantial issue," citing cases based on the "close question" standard adopted by the Sixth Circuit. See App. C. The Sixth Circuit denied Fisher's Emergency Motion for Bond Pending Appeal on December 23, 2009 stating that it could not conclude "at this stage of the appeal" that the defendant has overcome the presumption against release. It cited *United States v. Pollard*, 778 F.2d 1177 (6th Cir. 1985) which has adopted the "close question" standard of review for bonds on appeal. See App. 4a.

Fisher began incarceration for a term of 41 months on January 20, 2010 pending the outcome of an appeal to the Sixth Circuit. Fisher maintains that the District Court and the Sixth Circuit should have reviewed Fisher's Motion for Bond Pending Appeal under a "fairly debatable" issue standard of review

which would have resulted in granting bond on appeal.[1]

REASONS FOR GRANTING THE PETITION

A. Introduction[2]

The question of when a defendant is entitled to bail pending appeal has divided the circuits ever since Congress changed the bail standard more than 25 years ago. To date, this important question has evaded review by the Supreme Court. Most courts, including the Sixth Circuit, have made it harder for defendants to obtain bail pending appeal than Congress intended – an injustice that should be promptly corrected.

Under the Bail Reform Act of 1984, a defendant is entitled to bail pending appeal when he can prove (1) that he will not be a flight risk or a danger to the community while out on bail and (2) that his appeal will be meritorious enough to raise at least one "substantial question". The circuits unanimously agree that Congress intended to make it more difficult

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[1] Fisher maintains that his Motion for Bond on Appeal presents a substantial issue and should have been granted by the District Court and Sixth Circuit under the proper standard of review.

[2] Much of this Petition is derived from the Florida Law Review article authored by Doug Keller, "Resolving a 'Substantial Question': Just Who Is Entitled to Bail Pending Appeal Under the Bail Reform Act of 1984?", which is published at 60 Fla. L. Rev. 825 (September 2008). Mr. Keller's thorough research and thoughtful analysis of the "fairly debatable" vs. "close question" issue, which goes to the heart of this Petition, is heartily acknowledged and reproduced in part herein.

to obtain bail pending appeal when it passed the 1984 Bail Act. But the circuits disagree on how much harder Congress made it to obtain bail when it replaced the previous requirement that a defendant's appeal raise a non-frivolous issue with the current requirement that the appeal raise a "substantial question".

Most courts define a substantial question as a "close question".[3] The Ninth Circuit, on the other hand, defines a substantial question more broadly by employing the same definition of the phase as used in a prior version of the standard for bail pending appeal – i.e., as an issue that is "fairly debatable". See *United States v. Handy*, 761 F.2d 1279, 1281-82 (9th Cir. 1985). The difference between the "close question" standard and "fairly debatable" standard is not merely semantics. The current split among the circuits evidences the perceived difference between the words employed. Courts that have adopted the close question standard have held that, in the light of legislative history, the fairly debatable standard does not go as far as Congress intended in restricting bail. On the other hand, the Ninth Circuit reinstated the fairly debatable standard by arguing that Congress intended to use the historical meaning of substantial question.

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[3] See *United States v. Bayko*, 774 F.2d 516, 523 (1st Cir. 1985) (adopting the close question standard); *United States v. Randell*, 761 F.2d 122, 125 (2nd Cir. 1985); *United States v. Steinhorn*, 927 F.2d 195, 196 (4th Cir. 1991); *United States v. Valera-Elizondo*, 761 F.2d 1020, 1023-24 (5th Cir. 1985); *United States v. Pollard*, 778 F.2d 1177, 1182 (6th Cir. 1985); *United States v. Bilanzich*, 771 F.2d 292, 298-99 (7th Cir. 1985); *United States v. Powell*, 761 F.2d 1227, 1232-34 (8th Cir. 1985) (*en banc*), *United States v. Affleck*, 765 F.2d 944, 952 (10th Cir. 1985) (*en banc*); *United States v. Perholtz*, 836 F.2d 554, 555-56 (D.C. Cir. 1988).

See *Handy* at 1281-82. This Petition sides with the Third and Ninth Circuits and argues that the fairly debatable standard is the correct standard that should be used by all circuits when determining bond on appeal.

B. The History of Bail Pending Appeal

The relevant components of the standards for bail pending appeal are threefold:

The merit requirement which addresses whether the defendant's appeal must raise a non-frivolous issue, a substantial question, or something else to entitle the defendant to bail pending appeal.

The burden of proof requirement which addresses whether the defendant or the government has the burden to prove that the defendant has or has not met the merit requirement.

The character requirement which addresses whether the defendant should be denied bail for character issues such as posing a danger to the community or being a flight risk.

The legislature and the judiciary have, over time, adjusted these requirements to balance an individual's liberty interest against the community's interest in safety. From 1891 to 1934, the general rule was that "bail pending appeal would be granted in most non-capital cases unless there was a clear showing that the appeal was frivolous or taken for delay." See *United States v. Austin*, 614 F. Supp. 1208, 1212-3 (D.N.M. 1985).

In 1934, the Supreme Court, pursuant to its rule-making authority, changed the merit requirement by requiring defendants to prove that their appeal would raise a "substantial question which should be determined by the appellate court". See William F. Duker, "*The Right to Bail: A Historical Inquiry*", 42 Alb. L. Rev. 33, at 115 (quoting Sup. Ct. R. 6, 292 U.S. 663, 664 (1933)). The term "substantial question" was equated with the phrase "fairly debatable" by Justice Douglas in the case *D'Aquino v. United States,* 180 F.2d 271, 272 (Douglas, Circuit Justice, 9th Cir. 1950) and was adopted by the courts until Congress changed the standard for bail pending appeal again in 1956.[4]

In 1956 Congress reinstated the non-frivolous merit requirement providing that "[b]ail may not be allowed pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay". See Fed. R. Crim. P. 46(a)(2) as amended in 1956. This change effectively required the government to prove that any appeal taken would be frivolous. As a result, bond pending appeal was once again highly favored. This standard set the stage for the 1984 Bail Act.

In 1984, Congress reacted by making a number of changes to bail practice in the Bail Reform Act. The clear impetus for bail reform was the public's concern

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[4] See, e.g., *United States v. Warring*, 16 F.R.D. 524, 526 (D. Md. 1954) (applying Justice Douglas's standard in considering a bail pending appeal motion and citing *D'Aquino*; *United States v. Stephenson*, 110 F. Supp. 623, 627 (D. Alaska 1953) (same); *United States v. Glazer*, 14 F.R.D. 86, 88 (E.D. Mo. 1952) (same); *United States v. Barker*, 11 F.R.D. 421, 422 (N.D. Cal. 1951) (same); *United States v. Barbeau*, 92 F. Supp. 196, 202 (D. Alaska 1950) (same).

about crimes being committed by those out on bail. Most of the legislative changes were directed to defendants who were likely to re-offend – a secondary consideration was to eliminate "a presumption in favor of bail even after conviction".[5] The 1984 Bail Act, however, provided no guidance on what was a "substantial question of law or fact likely to result in reversal or a new trial".

C. Courts Divide Over the Meaning of "Substantial Question" in the 1984 Bail Act

The first circuit court to interpret the 1984 Act was the Third Circuit. In *United States v. Miller*, 753 F.2d 19 (3d Cir. 1985), it declared without explanation that a "substantial question" is an issue that is either: "novel, which has not been decided by controlling precedent, or which is fairly doubtful". *Id.* at p. 23. (The "fairly doubtful" wording appears to be a misalliteration of the earlier "fairly debatable" standard initially stated in *D'Aquino* at p. 272).

The next circuit, however, refused to follow the lead of the Third Circuit. In *United States v. Giancola,* 754 F.2d 898 (11th Cir. 1985), the Eleventh Circuit crafted a new definition of the term substantial question

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[5] S. Rep. No. 98-225, at 3, reprinted in 1984 U.S.C.C.A.N. at 3185 ("Many of the changes in the Bail Reform Act incorporated in this bill reflect the Committee's determination that Federal Bail laws must address the alarming problem of crimes committed by persons on release and must give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released."; and S. Rep. No. 98-225, at 26, reprinted in 1984 U.S.C.C.A.N., at 3209 re: the change in burden of proof.

determining it instead to be a "close question". *Id.* at 901. The Eleventh Circuit failed to explain its rationale for departure from or even acknowledge the historical definition of a "substantial question" as used in the prior period from 1934 to 1956.

Next, the Ninth Circuit weighed in. In *United States v. Handy*, 761 F.2d 1279 (9th Cir. 1985), the court adopted the historical definition of substantial question: a question that is "fairly debatable". *Id.* at 1281-82. According to the court, the standard is the functional equivalent of the Third Circuit's test. *Id.* at 1282. The court pointed to two lines of cases to support the view that the phrase "substantial question" had historically been understood to mean a fairly debatable issue. *Id.* at 1281 and 1282-83. Given this history, the Ninth Circuit presumed that Congress intended to use the historically settled definition of "substantial question". *Id.* at 1282-83.

Nevertheless, in short order, every other circuit sided with the Eleventh Circuit with that rarely stretched beyond a single sentence to support the change to a "close question" standard.

The state of the law on the intended meaning of "substantial question" has not changed since. On one side of the road sits the Third and Ninth Circuits. On the other sits the remaining circuits.

D. This Court Should Interpret a "Substantial Question" as a "Fairly Debatable" Issue

The Supreme Court should adopt the interpretation of Third and Ninth Circuits which move accurately balances the concerns of Congress that led to bail

reform and the need of society to prevent unjust deprivation of liberty. The history of the Bail Reform Act of 1984 demonstrates that it was Congress's intent only to ensure that those who were free on bail were not prone to committing more crimes. There is no legislative history or social justification which supports effectively denying bail to defendants who present no character concerns while pursuing legitimate (i.e. fairly debatable) issues on appeal. A defendant who is denied bail pending appeal and has his conviction reversed suffers the same injustice as a defendant who is imprisoned before trial and is subsequently acquitted.

The Supreme Court should take Congress at its word. Congress was concerned about crime, so it placed an unprecedented burden on defendants to prove that they are not a danger to the community. And it wanted to reverse the presumption in favor of bail that existed under prior law, so it placed the burden on the defendant to prove he is entitled to bail and took the burden from the government. But Congress did not intend to apply a radically stricter merit requirement.

CONCLUSION

A powerful case supports the Ninth Circuit's position that Congress in 1984 intended defendants to establish that their direct appeal would raise only a fairly debatable issue. Nevertheless, other Circuits, with the exception of the Third Circuit, have come to a different conclusion, creating a circuit split that has lasted twenty-five years. It is time for the Supreme Court to step in and resolve the dispute which affects many cases. In the meantime, many defendants will

serve prison time only to have their convictions overturned on appeal. Those defendants will suffer unjustified prison time – at taxpayer expense – to pay a debt to society they do not owe. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Petitioner pro se

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A: Order of the Sixth Circuit Dated January 14, 2010 Denying Defendant's Motion for a Stay Pending the Filing of a Petition for Writ of Certiorari 1a

Appendix B: Order of the Sixth Circuit Dated December 23, 2009 Denying Defendant's Motion for Bond Pending Appeal 3a

Appendix C: Opinion and Order of the District Court Dated November 19, 2009 Denying Defendant's "Motion for Bond Pending Appeal" 6a

Appendix D: Relevant Provisions from the 1984 Bail Reform Act, 18 U.S.C. § 3143(b)(1)(B) 13a

Appendix E: U.S. Const. amend. VIII 16a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 09-2460

[Filed January 14, 2010]

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
EDWARD F. FISHER,	)
	)
Defendant-Appellant.	)
	)

O R D E R

Before: KEITH, DAUGHTREY, and GIBBONS, Circuit Judges.

The defendant appeals his conviction of conspiracy to defraud the Internal Revenue Service. On December 23, 2009, we denied his motion for release on bail pending appeal. The defendant is to report to begin serving his sentence on January 20, 2010. He has now filed an emergency motion for a stay of the December 23 order pending a petition for a writ of certiorari to the United States Supreme Court.

The defendant has not satisfied the criteria for release pending appeal set forth in 18 U.S.C. § 3143(b)(1). *See United States v. Chilingirian*, 280 F.3d 704, 709 (6th Cir. 2002); *United States v. Pollard*, 778 F.2d 1177, 1181 (6th Cir. 1985). We decline to stay the December 23 order or to stay the defendant's sentence of imprisonment pending his petition for a writ of certiorari.

The motion for a stay of the December 23 order denying release on bail pending appeal is **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 09-2460

[Filed December 23, 2009]

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
EDWARD F. FISHER,	)
	)
Defendant-Appellant.	)
	)

O R D E R

Before: KEITH, DAUGHTREY, and GIBBONS, Circuit Judges.

The defendant appeals his conviction of conspiracy to defraud the Internal Revenue Service. The district court denied the defendant's motion for bond pending appeal on November 19, 2009. He now moves this court for release on bond pending appeal. The government opposes the motion.

To support release pending appeal, the defendant must show 1) by clear and convincing evidence that he is not likely to flee or pose a danger to the safety of another person or the community, and 2) that his appeal is not for delay and raises a substantial question of law or fact likely to result in reversal, an order for a new trial, a sentence that does not include a term of imprisonment, or a sentence reduced to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process. 18 U.S.C. § 3143(b)(1); *United States v. Chilingirian*, 280 F.3d 704, 709 (6th Cir. 2002); *United States v. Pollard*, 778 F.2d 1177, 1181 (6th Cir. 1985). This statute creates a presumption against release pending appeal. *See United States v. Roach*, 502 F.3d 425, 446-47 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 2051 (2008) (affirming the denial of release pending appeal because the defendant failed to raise a substantial question that would overcome the presumption against release); *United States v. Vance*, 851 F.2d 166, 168-69 (6th Cir.), *cert. denied*, 488 U.S. 893 (1988).

The district court did not find that the defendant's release pending appeal would pose a risk of flight or a danger to the community. The defendant argues that his appeal raises substantial issues of law and fact likely to result in the reversal of the conviction or a new trial. However, at this stage of the appeal, we cannot conclude that the defendant has overcome the presumption against release.

Therefore, the motion for release on bail pending appeal is **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 06-20415

[Filed November 19, 2009]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	)
	)
EDWARD F. FISHER,	)
	)
Defendant.	)
	)

OPINION AND ORDER DENYING DEFENDANT'S "MOTION FOR BOND PENDING APPEAL"

Pending before the court is Defendant's October 2, 2009 "Motion for Bond Pending Appeal." The Government filed a response brief on October 20, 2009. Because Defendant's appeal does not present a substantial question of law, the court will deny the Motion.

I. BACKGROUND

Defendant was indicted on two counts of conspiracy to commit fraud. A jury convicted Defendant of the first count, conspiracy to defraud the Internal Revenue Service ("IRS"), but acquitted him of the second count, conspiracy to commit bank fraud. Defendant was chief in-house counsel for Simplified Employment Services, Inc. ("SES"), an employment organization that, through its subsidiaries, administered the human-resources functions of its client companies, including paying employees and paying employment taxes to the IRS. As early as 1997, executives at SES formed a conspiracy to conceal SES's tax liability. In Spring 2000, Defendant retained attorney McGee Grigsby as outside counsel as part of the attempt to conceal tax liability from the IRS.

II. STANDARD

Pursuant to 18 U.S.C. § 3143(b)(1)(B), a court is required to release a defendant on bond pending appeal if the court makes two findings. First, the court must find, by clear and convincing evidence, that the defendant is not likely to flee or pose a danger to any person in the community. 18 U.S.C. § 3143(b)(1)(B). Second, the court must find that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in reversal; a new trial; a sentence without a term of imprisonment; or a sentence reduction to a term less than the time already served plus the expected duration of the appeal. *Id.* The Sixth Circuit has further elaborated on what it means to raise a substantial question of law. A substantial question is "one that could go either way" and "is so integral to the merits of the conviction that

it is more probable than not that reversal or a new trial will occur if the question is decided in the defendant's favor." *United States v. Pollard*, 778 F.2d 1177, 1182 (6th Cir. 1985).

III. DISCUSSION

Initially, there is no suggestion that Defendant might flee or pose a danger if granted bond.

On appeal and his attendant Motion for Bond, Defendant argues that the court erred when it (1) held that 17 exhibits of Grigsby's notes were inadmissible; (2) did not answer two questions submitted to the court by the jury during deliberations; (3) held that several exhibits were admissible pursuant to the crime-fraud exception to the work-product privilege; and (4) refused to grant Defendant's motion for judgment of acquittal.

Defendant argues that notes made by Grigsby should have been admitted as evidence pursuant to the business records exception to hearsay or under Federal Rule of Evidence 106, the so-called "rule of completeness." As the court reasoned in its "Opinion and Order Denying Defendant's Motion for Judgment of Acquittal and Denying Defendant's Motion for New Trial," of April 8, 2009, the notes were created in anticipation of litigation and were therefore not admissible under the business records exception. (4/8/09 Order 18.) Further, as the court reasoned in that same order, Federal Rule of Evidence 106 does not render inadmissible hearsay admissible. (4/8/09 Order 18-19.) Neither ruling presented a close question that "could go either way."

During the deliberation two questions asked by the jury were: (1) whether the attorney-client privilege applies to Defendant regarding his employment at SES; and (2) whether an attorney, on learning of illegal activities by his employer, is legally required to report this activity. Defendant asked the court to answer yes to the first question and no to the second. The court remains of the view, expressed in the Order of April 8, 2009, that the jury was properly instructed and an answer to these two questions would have unnecessarily complicated the jury's deliberations. Because the jury instructions, "viewed as a whole," were not "confusing, misleading and prejudicial," Defendant has not raised a close question of law that could go either way. *United States v. Young*, 553 F.3d 1035, 1050 (6th Cir. 2009).

Defendant also argues that the court improperly admitted Exhibits 101-08, and 111 pursuant to the crime-fraud exception to the work-product privilege. Defendant argues that the crime-fraud exception requires a district court to engage in a two-part analysis. First, the court must determine that the proposing party has made a prima facie showing of a crime or fraud. Second, the proposing party must establish a relationship between the communication at issue and the prima facie case. Defendant does not appear to challenge the first prong of this analysis.[1]

Defendant argues that "[t]here is no indication in the record that the [c]ourt ever looked at or even considered any of the documents it admitted, including

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[1] Indeed, such a challenge would be difficult, because the jury convicted Defendant of fraud.

a work product document which preceded the alleged conspiracy by over a year." (Def.'s Mot. Br. 23.) But Defendant goes no farther than asserting that the court failed to create a record establishing a relationship between the fraud and the particular documents; Defendant makes practically no argument that particular documents in question were unrelated to the crime or fraud at issue.

As the court stated in the Order of April 8, 2009, many of the documents (specifically, Exhibits 101, 103-104, 106-108) involved communications between Grigsby and Defendant. "Because Defendant's alleged role in the conspiracy was to communicate a fabricated cause for SES's tax liabilities to Grigsby, these notes can be viewed as made for that purpose, and thus intended to further the conspiracy." (4/8/09 Order 16.) Exhibit 105 can be viewed as the execution of the strategy of blaming "the systems, the software and the people within the accounting department" for "the deficiency within the tax[es]." (Trial Tr. vol. II, 40-41, June 19, 2008.) Finally, Exhibit 111 plainly states that SES senior executives should not "make open displays of wealth" on days when the IRS was inspecting SES. This statement can certainly be viewed as furthering a plan to defraud the IRS. The court therefore finds no close question of law concerning the admission of these exhibits.[2]

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[2] Further, it is not clear to the court that Defendant has preserved his objection to the admission of all of these exhibits for appeal. In his motion in limine, Defendant objected to the admission of three pieces of evidence as being covered by the work-product privilege, (Mot. in Limine to Exclude Att'y Work Product Evidence 5.); here, he argues that nine exhibits should have been held inadmissible based on the privilege. At least five of these nine were admitted at

Finally, Defendant argues that review of this court's denial of his motion for judgment of acquittal raises a substantial question of law. As the court detailed in the Order of April 8, 2009, a reasonable trier of fact could have found beyond a reasonable doubt that a conspiracy existed "in which Defendant . . . agreed to falsify tax returns, engage in the Back-Out Plan, and blame software and accounting for [SES's] tax deficiency." (4/8/2009 Order 6.) Defendant raises nothing that suggests the court's previous ruling was a question that could go either, and the court therefore finds no substantial question of law.

IV. CONCLUSION

IT IS ORDERED that Defendant's "Motion for Bond Pending Appeal" [Dkt. # 131] is DENIED.

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trial without objection. (Trial Tr. vol. II, 56, 61, June 19, 2008; Trial Tr. vol. III, 18, 22, June 20, 2008; Trial Tr. vol IX, 291, July 1, 2008.) The court realizes that a defendant need not necessarily object at trial to preserve an evidentiary issue for appeal:

> [I]f the trial court has made an explicit and definitive ruling on the record of the evidentiary issues to be decided, and has not indicated that the ruling is conditioned upon any other circumstances or evidence, then counsel need not renew the objection at the time the evidence is offered (or would have been offered but for an exclusionary ruling) in order to preserve the error for appeal.

United States v. Brawner, 173 F.3d 966, 970 (6th Cir. 1999). But, here, it seems that to preserve the issue for appeal Defendant must have either raised the objection in his Motion in Limine or at trial.

S/Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: November 19, 2009

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, November 19, 2009, by electronic and/or ordinary mail.

S/Lisa Wagner
Case Manager and Deputy Clerk
(313) 234-5522

S:\Cleland\JUDGE'S DESK\C2 ORDERS\06-20415.Fisher.Deny.Bond.Pending.Appeal.bsc.wpd

APPENDIX D

18 U.S.C. § 3143. Release or detention of a defendant pending sentence or appeal

(a) Release or detention pending sentence.—(1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and who is awaiting imposition or execution of sentence, other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonment, be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c). If the judicial officer makes such a finding, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c).

(2) The judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and is awaiting imposition or execution of sentence be detained unless—

> (A)(i) the judicial officer finds there is a substantial likelihood that a motion for acquittal or new trial will be granted; or

(ii) an attorney for the Government has recommended that no sentence of imprisonment be imposed on the person; and

(B) the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community.

(b) Release or detention pending appeal by the defendant.—(1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds—

(A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and

(B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—

(i) reversal,

(ii) an order for a new trial,

(iii) a sentence that does not include a term of imprisonment, or

(iv) a reduced sentence to a term of imprisonment less than the total of the time

already served plus the expected duration of the appeal process.

If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c) of this title, except that in the circumstance described in subparagraph (B)(iv) of this paragraph, the judicial officer shall order the detention terminated at the expiration of the likely reduced sentence.

(2) The judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained.

(c) Release or detention pending appeal by the government.—The judicial officer shall treat a defendant in a case in which an appeal has been taken by the United States under section 3731 of this title, in accordance with section 3142 of this title, unless the defendant is otherwise subject to a release or detention order.

Except as provided in subsection (b) of this section, the judicial officer, in a case in which an appeal has been taken by the United States under section 3742, shall—

(1) if the person has been sentenced to a term of imprisonment, order that person detained; and

(2) in any other circumstance, release or detain the person under section 3142.

APPENDIX E

U.S. Constitution Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

No. 09-1383

In the Supreme Court of the United States

EDWARD F. FISHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's pending appeal from his conviction after a jury trial for conspiracy to commit tax fraud raises "a substantial question of law or fact," 18 U.S.C. 3143(b)(1)(B), such that he is entitled to release pending appeal under Section 3143(b)(1).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 5
Conclusion 11
Appendix – Opinion and order (Apr. 8, 2009) 1a

TABLE OF AUTHORITIES

Cases:

D'Aquino v. *United States*, 180 F.2d 271 (9th Cir. 1950) 7
United States v. *Affleck*, 765 F.2d 944 (10th Cir. 1985) 9
United States v. *Bayko*, 774 F.2d 516 (1st Cir. 1985) 9
United States v. *Bilanzich*, 771 F.2d 292 (7th Cir. 1985) 9
United States v. *Giancola*, 754 F.2d 898 (11th Cir. 1985), cert. denied, 479 U.S. 1018 (1986) 8, 9
United States v. *Handy*, 761 F.2d 1279 (9th Cir. 1985) 6, 9
United States v. *Messerlian*, 793 F.2d 94 (3d Cir. 1986), cert. denied, 485 U.S. 988 (1988) 7, 8
United States v. *Miller*, 753 F.2d 19 (3d Cir. 1985) 7
United States v. *Pollard*, 778 F.2d 1177 (6th Cir. 1985) 9
United States v. *Smith*, 793 F.2d 85 (3d Cir. 1986), cert. denied, 479 U.S. 1031 (1987) 8, 9

Statutes and rule:

Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.* 5
18 U.S.C. 3143(b) 3, 5

Statutes and rule—Continued: Page

18 U.S.C. 3143(b)(1) 4, 5
18 U.S.C. 3143(b)(1)(A) 4
18 U.S.C. 3143(b)(1)(B) 4
18 U.S.C. 371 2
Fed. R. App. P. 9(b) 4

In the Supreme Court of the United States

No. 09-1383

EDWARD F. FISHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The orders of the court of appeals denying petitioner's motion for release on bond pending appeal (Pet. App. 3a-5a) and denying a stay of that order (Pet. App. 1a-2a) are unreported. The order of the district court (Pet. App. 6a-12a) is unreported but is available at 2009 WL 4042885.

JURISDICTION

The orders of the court of appeals were entered on December 23, 2009, and January 14, 2010. The petition for a writ of certiorari was filed on March 20, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiring to defraud the Internal Revenue Service (IRS), in violation of 18 U.S.C. 371. Pet. App. 7a. The district court denied petitioner's post-trial motions for a judgment of acquittal and a new trial (App. *infra*, 1a-23a), and it sentenced petitioner to 41 months of imprisonment to be followed by three years of supervised release. Petitioner filed a notice of appeal and a motion for release pending appeal. Pet. App. 6a. Finding that petitioner's appeal did not present a substantial question of law, the district court denied the motion. *Ibid.* Petitioner then moved in the court of appeals for release pending appeal. The court of appeals denied the motion, finding "at this stage of the appeal, we cannot conclude that [petitioner] has overcome the presumption against release." *Id.* at 4a. The court of appeals also denied petitioner's motion to stay that order. *Id.* at 2a. Petitioner's subsequent application to Justice Stevens for release pending appeal was also denied. *Fisher* v. *United States*, No. 09A711 (Jan. 27, 2010).

1. Petitioner was indicted and tried before a jury on one count of conspiracy to defraud the IRS, in violation of 18 U.S.C. 371, and one count of conspiracy to commit bank fraud, in violation of 18 U.S.C. 371. Pet. App. 7a. The evidence at trial showed that from 1994 through 2001, petitioner was in-house counsel for Simplified Employment Services, Inc. (SES), a professional employment organization that administered many of the human resources functions, including payroll, of its client companies. App., *infra*, 2a. Beginning in 1997, executives at SES conspired to file false tax returns, and they falsified the company's relationship with clients to conceal SES's

tax liabilities. *Ibid.* The evidence showed that petitioner had joined the conspiracy by late 1999, though some evidence suggested that he may have been involved as early as 1997. *Ibid.* Trial testimony and documentary evidence established petitioner's participation in the conspiracy, his participation in an agreement to blame other sections of SES for the tax deficiencies, and his intent to file inaccurate tax returns after the IRS's arrival on SES premises. *Id.* at 6a-8a. In 2000, petitioner retained outside counsel, McGee Grigsby, as part of the conspirators' attempt to conceal from the IRS the fact that SES's tax deficiencies were not accidental. Pet. App. 7a.

The jury found petitioner guilty of conspiracy to defraud the IRS, but acquitted him of conspiracy to commit bank fraud. Pet. App. 7a. Petitioner moved for a judgment of acquittal and for a new trial. App., *infra*, 1a. The district court denied both motions, holding that the evidence was sufficient to sustain petitioner's conviction and finding no error in the evidence admitted and excluded at trial or in the court's response to certain questions posed by the jury during deliberations. *Id.* at 1a-23a.

2. Petitioner filed a notice of appeal and moved under 18 U.S.C. 3143(b) for release pending his appeal of the denial of his motion for a judgment of acquittal and three asserted trial errors: (1) the exclusion of Grigsby's notes from evidence as inadmissible hearsay, (2) the district court's decision not to answer two questions posed by the jury during deliberations but to instead refer the jury to the court's instructions, and (3) the admission of several exhibits under the crime-fraud exception to the protection for attorney work-product. Pet. App. 8a.

The government conceded that petitioner satisfied one of the requirements for release pending appeal, in that he was "not likely to flee or pose a danger the safety of any other person or the community if released," 18 U.S.C. 3143(b)(1)(A). See Pet. App. 8a. But the government explained that petitioner failed to satisfy the further requirement that his appeal "raise[] a substantial question of law or fact likely to result in" a reversal, new trial, or materially reduced sentence, 18 U.S.C. 3143(b)(1)(B).

The district court denied petitioner's motion. Pet. App. 6a-12a. On the substance of each issue petitioner proposed to raise on appeal, the district court adhered to its analysis in denying petitioner's motions for a judgment of acquittal and for a new trial; it found no issue to "present[] a close question that 'could go either way.'" *Id.* at 8a; see *id.* at 8a-11a. With respect to petitioner's argument that certain exhibits should not have been admitted under the crime-fraud exception to the protection for attorney work product, the district court suggested that petitioner had not entirely preserved the issue for review because he failed to move *in limine* or object during trial to the admission of most of the challenged exhibits. *Id.* at 10a n.2.

3. Petitioner sought review by moving in the court of appeals for release on bond pending appeal. See Fed. R. App. P. 9(b). The court of appeals denied that motion. Pet. App. 3a-5a. It noted that 18 U.S.C. 3143(b)(1) "creates a presumption against release pending appeal." Pet. App. 4a. Although petitioner "argue[d] that his appeal raises substantial issues of law and fact likely to result in the reversal of his conviction or a new trial," the court of appeals concluded that "at this stage of the

appeal," it could not "conclude that [petitioner] has overcome the presumption against release." *Ibid.*

Petitioner next sought an emergency stay of the court of appeals' order, pending the disposition of a petition for a writ of certiorari in this Court. Pet. App. 1a. The court of appeals again concluded that petitioner "has not satisfied the criteria for release pending appeal set forth in 18 U.S.C. 3143(b)(1)," and accordingly it denied his emergency motion. *Id.* at 2a.

Shortly after reporting for custody on January 20, 2010, petitioner applied to Justice Stevens, as Circuit Justice for the Sixth Circuit, for release pending appeal or pending disposition of a petition for a writ of certiorari. See Application, *Fisher* v. *United States*, No. 09A711 (filed Jan. 22, 2010). Justice Stevens denied the application without requesting a response from the government.

ARGUMENT

The Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*, creates a presumption that a convicted criminal defendant "shall * * * be detained" while an appeal is pending, but it allows the release of the defendant pending appeal if the defendant shows, among other things, that (1) he does not pose a flight risk or a danger to public safety, and (2) that the appeal raises a "substantial question of law or fact" likely to result in material relief such as a reversal of his conviction or an order for a new trial. 18 U.S.C. 3143(b)(1). Petitioner contends (Pet. 7-8) that the circuits are divided on whether a "substantial question" is one that is "fairly debatable" or rather is a "close question." He urges (Pet. 9-12) this Court to adopt the former view.

That issue does not warrant review. Even if courts have at times offered different phrases to explicate the statute's "substantial question" standard, petitioner does not attempt to show that such subtle differences actually lead to disparate outcomes. Nor do they, because courts are ultimately faithful to the standard prescribed in the statute itself and focus on the merits of the case at hand. Here, for example, the court of appeals simply invoked the text of the statute in deciding that petitioner did not raise "substantial issues of law and fact." Pet. App. 4a. Moreover, resolving the supposed split as petitioner asks still would not entitle petitioner to release pending appeal because petitioner's underlying claims of error are insubstantial on any interpretation of the standard, and they have been rightly rejected on the five occasions he has pressed them. Further review is not warranted.

1. Petitioner contends that the circuits are divided on whether a "substantial question" is one that is "fairly debatable" (the Third and Ninth Circuits' phrase of choice, in petitioner's view) or instead is a "close question" (the phrase used by the other regional circuits, in petitioner's view). Pet. 7 & n.3, 10. Although those phrases (and others) doubtless appear in decisions from various courts, they reflect no split calling for this Court's intervention.

As an initial matter, petitioner fails to explain why any distinction between the "close question" and "fairly debatable" formulations is sufficiently important to warrant this Court's review. Although the "close question" formulation "might, if read literally," be inconsistent with the "fairly debatable" formulation, *United States* v. *Handy*, 761 F.2d 1279, 1282 & n.2 (9th Cir. 1985), nothing suggests that this difference in terminology has any

effect on outcomes. Indeed, petitioner makes no attempt to show that the different formulations cause similarly situated defendants to be treated differently in different circuits. And the government is unaware of any such disparity. Rather, bail applications like petitioner's rise or fall on the substantiality of the issues presented on the facts of the particular case, not the nuances of a particular circuit's gloss on the undisputed "substantial question" standard that the Bail Reform Act prescribes. See, *e.g.*, *United States* v. *Messerlian*, 793 F.2d 94, 96 (3d Cir. 1986) (evaluating a request for bail pending appeal under both the "fairly debatable" and "close question" standards, and coming to the same conclusion under both standards), cert. denied, 485 U.S. 988 (1988).

Nor is the variation in the circuits even as stark as petitioner suggests. *United States* v. *Miller*, 753 F.2d 19 (3d Cir. 1985)—the first appellate decision on the Bail Reform Act's release-pending-appeal provision—used neither formulation when discussing the meaning of a "substantial question." In giving "a reasonable construction to the statutory language in a manner that effectuates the congressional intent" behind the law enacted a year earlier, *Miller* explained that a "substantial question" is one "which is either novel, which has not been decided by controlling precedent, or which is fairly doubtful." *Id.* at 23.[1]

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[1] Petitioner posits that "fairly doubtful" is a "misalliteration" of the "fairly debatable" language used by Justice Douglas in *D'Aquino* v. *United States*, 180 F.2d 271 (9th Cir. 1950). Pet. 10 (citing *D'Aquino*, 180 F.2d at 272 (Douglas, Circuit Justice)). Nothing in *Miller* supports that assumption: nowhere in *Miller* does the court base its explanation of what constitutes a "substantial question" on *D'Aquino*, a case decided by the Ninth Circuit 35 years earlier under a different bail

The Eleventh Circuit considered the issue one month later in *United States* v. *Giancola*, 754 F.2d 898 (1985), cert. denied, 479 U.S. 1018 (1986). Contrary to petitioner's suggestion (Pet. 10) that the Eleventh Circuit refused to follow the Third Circuit's lead, *Giancola* explicitly stated that it was adopting the Third Circuit's understanding of "substantial question." See 754 F.2d at 901 ("The Third Circuit's interpretation effectuates this congressional intent. * * * We, thus, agree with the Third Circuit's interpretation, though we add the following observations."). *Giancola*'s only qualification was to note that "an issue may be without controlling precedent largely because that issue is so patently without merit that it has not been found necessary for it to have been resolved." *Ibid.*

The courts of appeals to address the issue subsequently—including the Ninth Circuit, which petitioner identifies as the only circuit clearly supporting his position—have emphasized their agreement with the Eleventh Circuit that the "substantial question" inquiry is necessarily case-specific and that "there are no blanket categories for what questions constitute 'substantial' ones." *Giancola*, 754 F.2d at 901; accord *United States* v. *Smith*, 793 F.2d 85, 89 (3d Cir. 1986) ("[W]hether a particular question is 'substantial' must be determined

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statute. To the contrary, *Miller* grounded its definition of "substantial question" in the purpose behind Congress's more recent enactment of the Bail Reform Act of 1984, which sought to "reverse the presumption in favor of bail that had been established under the prior statute, the Bail Reform Act of 1966." 753 F.3d at 22. In all events, the Third Circuit has employed both the "fairly debatable" and "close question" standards in later cases, apparently favoring the former. See *United States* v. *Smith*, 793 F.2d 85, 89 (1986), cert. denied, 479 U.S. 1031 (1987); *Messerlian*, *supra*.

on a case-by-case basis.") (quoting *Giancola*, 754 F.2d at 901); *United States* v. *Affleck*, 765 F.2d 944, 952 (10th Cir. 1985) (same); *United States* v. *Handy*, 761 F.2d 1279, 1282 n.2 (9th Cir. 1985) (same); *United States* v. *Bayko*, 774 F.2d 516, 523 (1st Cir. 1985) ("[W]hether a question is 'close' or not is to be made on a case-by-case basis."); *United States* v. *Bilanzich*, 771 F.2d 292, 299 (7th Cir. 1985) ("[T]he phrase 'substantial question' is not capable of precise definition but must be left to a case-by-case determination.").

The Ninth Circuit (in *Handy*, 761 F.2d at 1282) and the Third Circuit (in *Smith*, 793 F.2d at 89) did disapprove of *Giancola*'s phrase, "close question." But experience has shown that what matters is the method of approaching each application on a case-by-case basis (something on which all courts are in accord), not the particular gloss the court of appeals has given to the statutory "substantial question" standard (an issue on which there is at most a nominal split). The court of appeals' orders here aptly demonstrate this: The court referred to the "substantial question of law or fact" standard, but it never used the phrase "close question."[2] Instead, it focused on petitioner's claim "that his appeal raises substantial issues of law and fact," and simply found his arguments unpersuasive: "[A]t this stage of the appeal, we cannot conclude that the defendant has overcome the presumption against release." Pet. App. 4a.

2. Even if the circuits' different choices of words to explicate "substantial question" merited this Court's

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[2] The court of appeals' orders cite *United States* v. *Pollard*, 778 F.2d 1177 (6th Cir. 1985), a case that uses the phrase "close question." But neither order invokes the "close question" standard or cites the part of *Pollard* discussing that standard.

attention, this case would be an inappropriate vehicle to address the issue. Although petitioner did not specifically argue to the courts below that the "close question" formulation was inappropriate (and thus they had no reason to pass on whether petitioner would have been entitled to release on some other standard), it is clear that petitioner would not be entitled to relief under any plausible interpretation of the "substantial question" standard.

Petitioner has presented, explicitly or by reference, each of the claims that are the substance of his appeal at least five times: first to the district court in his motions for a judgment of acquittal and for a new trial, then in seeking release pending appeal from the district court, then in his motion and emergency motion to the court of appeals, and finally in his application to Justice Stevens. He has been denied relief each time. No jurist has suggested there is anything "novel," "close," "doubtful," "debatable" or otherwise colorable about petitioner's assignments of error. Rather, as the district court's careful and thorough decision rejecting petitioner's claims confirms, there is no merit whatever to his appeal. See App., *infra*, 1a-23a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2010

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 06-20415

UNITED STATES OF AMERICA, PLAINTIFF

v.

EDWARD W. FISHER, DEFENDANT

Apr. 8, 2009

OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AND DENYING DEFENDANT'S MOTION FOR NEW TRIAL

Pending before the court are a motion for judgment of acquittal and a motion for new trial, both filed by Defendant Edward W. Fisher on July 31, 2008. The Government filed a response to each motion on September 3, 2008. For the reasons stated below, the court will deny both Defendant's motions.

I. BACKGROUND

Defendant Edward W. Fisher was charged with two counts of conspiracy to commit fraud. Following Defendant's trial, a jury convicted Defendant of count one of

the indictment: conspiracy to defraud the Internal Revenue Service ("IRS"). Defendant now argues there was insufficient evidence of his participation in the conspiracy to support the jury's finding of guilt as to count one of the indictment and that a judgment of acquittal must therefore be entered. Defendant argues, in the alternative, that he should receive a new trial because cumulative error in determining the admissibility of evidence produced an unfairly prejudicial trial.

Defendant served as an attorney for Simplified Employment Services, Inc. ("SES") from 1994 to 2001. SES was a professional employment organization, which administered, through its subsidiaries, many of the personnel and human resources functions of its client companies, including issuing employee pay checks and remitting employment taxes to the IRS. In 1997, executives at SES began to conspire to file false and understated tax returns. In addition, the conspirators falsified SES's relationship with clients, sometimes termed "co-employers," in an attempt to conceal SES's tax liabilities ("Back-Out Plan"). Defendant was alleged to have joined the conspiracy by late 1999. Some evidence presented at trial indicated that Defendant may have generated the idea for the Back-Out Plan as early as 1997. (D. Lambka Trial Tr. vol. II, 30, June 19, 2008.) On May 9, 2000, Defendant retained attorney McGee Grigsby, of the law firm Latham & Watkins, LLP, as outside counsel on behalf of SES. Grigsby's involvement was to be part of an SES plan, the government charged, to conceal the true cause of the tax liability from the IRS.

II. DISCUSSION

A. Defendant's Motion for Judgment of Acquittal

Defendant moves for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 because Defendant contends that the evidence presented at trial[1] is not sufficient to sustain a conviction for conspiracy to defraud the Internal Revenue Service ("IRS"). (Def.'s Mot. J.A. at 1.) Defendant argues that he had no more than "mere knowledge" of criminal activity, and that he neither communicated with the IRS nor misled outside counsel McGee Grigsby regarding SES's tax liability. (Def.'s Mot. J.A. at 1.) In response, the Government maintains that the testimony presented at trial was capable of proving that Defendant joined the conspiracy to conceal SES's tax liability by attributing it to software and accounting problems and that Defendant communicated with SES's outside counsel to effectuate the cover-up. (Gov't Resp. J.A. at 2.)

1. Standard

The court may enter a judgment of acquittal if the evidence presented at trial is insufficient to support a conviction. Fed. R. Crim. P. 29. "In reviewing challenges regarding the sufficiency of the evidence presented to the jury, [the court is] limited to ascertaining whether, viewing the evidence in the light most favorable to the government, '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Carmichael*, 232

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[1] Both Defendant and the Government refer to the trial exhibits by the designations given them at trial. For convenience, this court will follow the same procedure.

F.3d 510, 519 (6th Cir. 2000) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); citing *United States v. Talley*, 164 F.3d 989, 996 (6th Cir. 1999)). A court must therefore "draw all available inferences in favor of the jury's verdict." *United States v. Maliszewski*, 161 F.3d 992, 1006 (6th Cir. 1998) (citing *United States v. Smith*, 39 F.3d 119, 121 (6th Cir. 1994)). Moreover, "'[s]ubstantial and competent' circumstantial evidence by itself may support a verdict and need not 'remove every reasonable hypothesis except that of guilt.'" *United States v. Lee*, 359 F.3d 412, 418 (6th Cir. 2004) (quoting *United States v. Stone*, 748 F.2d 361, 363 (6th Cir. 1984)). Thus, "[a] defendant bringing such a challenge bears a 'very heavy burden.'" *United States v. Daniel*, 329 F.3d 480, 485 (6th Cir. 2003) (quoting *United States v. Vannerson*, 786 F.2d 221, 225 (6th Cir. 1986)).

2. Discussion

To demonstrate a conspiracy, the Government must show (1) the conspiracy described in the indictment was willfully formed, and was existing at or about the time alleged; (2) that the accused willfully became a member of the conspiracy; (3) that one of the conspirators thereafter knowingly committed at least one overt act charged in the indictment at or about the time and place alleged; and (4) that such overt act was knowingly done in furtherance of some object or purpose of the conspiracy as charged. *United States v. Kraig*, 99 F.3d 1361, 1368 (6th Cir. 1996) (citing *United States v. Sturman*, 951 F.2d 1466, 1474 (6th Cir. 1991)); *United States v. Mullins*, 22 F.3d 1365, 1368 (6th Cir. 1994). While "proof of a formal agreement is not necessary to establish a conspiracy," *United States v. Barger*, 931 F.2d

359, 369 (6th Cir. 1991), more is necessary than evidence showing "[m]ere knowledge or approval, without participation." *United States v. Bostic*, 480 F.2d 965, 968 (6th Cir. 1973). However, "'[i]t is only necessary that a defendant know of the conspiracy, associate himself with it, and knowingly contribute his efforts in its furtherance.'" *Barger*, 931 F.2d at 369 (quoting *United States v. Luxenberg*, 374 F.2d 241, 250 (6th Cir. 1967)). In addition, "'[a] conspiracy may be inferred from circumstantial evidence that can reasonably be interpreted as participation in the common plan.'" *Id.* at 369 n.6 (quoting *United States v. Bavers*, 787 F.2d 1622, 1626 (6th Cir. 1985)).

When "viewing the evidence in the light most favorable to the government," *Carmichael*, 232 F.3d at 519, the court finds that Defendant cannot satisfy the burden required for a judgment of acquittal. Defendant argues that based on the evidence presented at trial, the Government presented insufficient evidence to sustain its theory of conspiracy and makes two main arguments to support this contention: (1) Defendant possessed no more than "mere knowledge" regarding the conspiracy (as demonstrated by testimony from Janice Picklo, Dennis Lambka, and David Carlesimo); and (2) Defendant did nothing to further the conspiracy because he could not have misled Grigsby, who already knew about the tax liabilities.[2] However, neither argument demonstrates that there was such insufficient evidence pre-

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[2] Defendant also argues that any ethical violation he may have committed cannot form the basis for criminal liability. (Def.'s Mot. J.A. at 8.) The Government concurs (Gov't Resp. J.A. at 1), as does the court, in that attorneys, as such, will not be held to a different standard for conspiracy liability. See *Kraig*, 99 F.3d at 1368.

sented by the Government as to require a judgment of acquittal; rather, Defendant engages in rearguing the impact or force of trial testimony, attempting, essentially, to discredit the Government's theory regarding the conspiracy.

First, Defendant argues that testimony presented by witnesses at trial shows that Defendant did not direct the misstatement of tax forms; at most, Defendant was present at meetings where filing false tax forms and the Back-Out Plan, among other things, were discussed, and this constitutes "mere knowledge" at best. Janice Picklo, an SES executive who was responsible for the calculation of employment taxes at SES, testified that she prepared IRS Form 941 quarterly employment tax returns ("Form 941"), deliberately under-reporting or under-paying the taxes at the direction of Dennis Lambka, chief executive officer at SES, but that she never told Defendant about this. (Def. s Mot. J.A. at 4-7.) Dennis Lambka and David Carlesimo, the SES executive who was in charge of sales and marketing, further testified that while Defendant was sometimes present while they discussed Form 941 filings, Defendant did not take part in their preparation or the ultimate underpayment. (Def.'s Mot. J.A. at 6.) Defendant also emphasizes that some witnesses testified to Defendant's opposition to the underpayment of employment taxes and that no evidence showed Defendant had any contact with the IRS. (Def.'s Mot. J.A. at 11-12.) Defendant submits that this testimony demonstrates that, at most, he had knowledge of the conspiracy but that he took no action himself. This contention, however, does not account for the fact that once the Government has established a conspiracy, little additional evidence is necessary to implicate Defendant. *See United States v. Sturman*, 951 F.2d

1466, 1474 (6th Cir. 1991) (citing *United States v. Poulos*, 895 F.2d 1113, 1117 (6th Cir. 1990), abrogated on other grounds). Defendant does not allege—nor could he—that no conspiracy existed; he argues only that he did not participate in it.

A "'rational trier of fact could have found . . . beyond a reasonable doubt'" that a conspiracy existed in which Defendant, Dennis Lambka, Ron Bray, and Dennis Stout agreed to falsify tax returns, engage in the Back-Out Plan, and blame software and accounting for their tax deficiency. *See Carmichael*, 232 F.3d at 519; (Gov't Resp. J.A. at 2). Even if Defendant himself did not submit false returns to the IRS, a plan to do so existed. (Gov't Resp. J.A. at 2; Def.'s Mot. J.A. at 4-7.) Dennis Lambka testified at trial that Defendant agreed to "take the strategy that the systems, the software and the people within the accounting department were to the major blame for the deficiency within the tax taxes and that [Defendant] would convey this to [Grigsby]." (D. Lambka Trial Tr. vol. II, 40-41, June 19, 2008.) David Carlesimo also testified at trial that any open opposition Defendant showed to the Back-Out Plan was merely anger that too many SES employees were working so openly on the project. (D. Carlesimo Trial Tr. vol. IX, 7, July 1, 2008.) Brian Lambka, Dennis Lambka's brother, also testified that he discussed with Defendant his intention to file inaccurate tax returns because of IRS agent's arrival on SES premises and requests for tax returns. (B. Lambka Trial Tr. vol. II, 24-25, June 19, 2008.) Evidence presented by the Government could have shown that Defendant hired and communicated to outside counsel Grigsby that software and accounting issues caused the tax deficiency. A reasonable jury could infer that Defendant voluntarily contributed his efforts to, and

knowingly participated in, the conspiracy, intending to assist it. *See Sturman*, 951 F.2d at 1474 (finding that based on actions such as opening foreign bank accounts under assumed names and serving as a director at a corporation which channeled money to other businesses, a jury could reasonably infer that an individual participated in a conspiracy); *see also United States v. Hunt*, 521 F.3d 636, 647 (6th Cir. 2008) (holding that defendant doctor tacitly agreed to conspiracy to Medicare fraud when he signed private insurance bills for Medicare patients even though he denied knowledge that his co-conspirator fraudulently submitted the bills).

Furthermore, Defendant drafted a document, Exhibit 106, which purported to detail the causes of SES's tax liabilities ("Causes Document"), claiming that accounting and software issues were to blame for the underpayment of taxes. Defendant was also involved in drafting and revising a definition for a "co-employer," an SES term for a class of client used by SES for tax purposes, in order that the definition would effectively conceal SES's tax liabilities from the IRS. A reasonable jury could have found that these documents demonstrate Defendant's knowledge of and complicity in the co-conspirators' crafting of a false story to explain the underpayment of employment taxes. *See United States v. Conatser*, 514 F.3d 508, 518 (6th Cir. 2008) (holding that sufficient evidence existed to convict defendant prison guard of conspiracy to assault inmates when he stood outside prison cell while other guards assaulted inmates, falsified a report, and joked about the assaults). Based on Defendant's actions, a jury could reasonably infer that he joined an on-going conspiracy. The court will deny Defendant's motion as to this argument. *See Kraig*, 99 F.3d at 1368.

Second, Defendant maintains that the Government's theory that Defendant participated in the conspiracy by misleading SES's outside counsel Grigsby is simply wrong. (Def.'s Mot. J.A. at 13.) Defendant argues that the Government falsely interpreted a number of trial exhibits and testimony and that Grigsby knew of the tax liability, demonstrating that Defendant's role in the conspiracy could not have been to conceal the tax liability from Grigsby. In particular, Defendant submits the following:

1) Defendant's notes, contained in Exhibits 103 and 104, stating, "[N]ot recommending any voluntary disclosure," and, "Do not make voluntary disclosure," represent Grigsby's recommendation to SES regarding a legal strategy, or term of art, and do not demonstrate that Defendant concealed information from Grigsby. (Def.'s Mot. J.A. at 13, 18.)

2) Defendant's role in the conspiracy could not have been to conceal SES's tax liabilities from Grigsby because Grigsby knew of the tax liabilities, as shown by Exhibit 101, Defendant's notes from a meeting Grigsby, stating, "A conscious decision was made to use tax dollars for other liabilities," and Exhibit 593, the Wyderko report on the amount of the tax liability, entitled "Tax Overview." (Def.'s Mot. J.A. at 19-22.)

3) Defendant wrote Exhibits 107 and 108, emails to which were attached a document regarding SES's definition of "co-employer" for Grigsby's review, and Defendant never submitted these documents to the IRS. Def.'s Mot. J.A. at 22-23.

4) Exhibits 105 and 106, an email exchange, which includes an attached document drafted by Defendant to explain the causes of the tax liabilities ("Causes Document") were really the ideas of Dennis Lambka's, Defendant merely served as the "scrivener." (Def.'s Mot. J.A. at 23-24.)

In each instance, Defendant offers no more than an alternate explanation or argument about the significance of each document and the related testimony. This does not satisfy the minimum requirement for a judgment of acquittal. A defendant must show that, when viewing the evidence in a light most favorable to the Government, no rational trier of fact could have found the elements beyond a reasonable doubt. *See Carmichael*, 232 F.3d at 519. A jury could have reasonably inferred from these documents that Defendant in fact concealed facts pertinent to the investigation from Grigsby. (Gov't Resp. J.A. at 3.)

First, a reasonable jury could have found that Exhibits 103 and 104 (no "voluntary disclosure") meant that Defendant would not reveal the true cause of the tax liabilities to anyone outside SES. In addition, a reasonable jury could have found that the statement "lay the foundation of our defense of bad data" (in Exhibit 104) referred to an intentionally false explanation which, together with Brian Lambka's testimony that Defendant's role in the conspiracy was to be to mislead Grigsby (B. Lambka Trial Tr. vol. II, 61-62, June 19, 2008), proved that Defendant did know of and participate in a conspiracy to defraud the IRS. Brian Lambka further testified at trial that he had discussed with Defendant a strategy of nondisclosure, consistent with Exhibit 104, towards Grigsby. (B. Lambka Trial Tr. vol. II, 61-62, June 19,

2008.) Defendant offers only a plausible alternate explanation for the notes contained in Exhibits 103 and 104, but this does not rebut the reasonable conclusions from the same evidence that a jury would be entitled to draw.

Second, while Grigsby certainly knew of a tax liability—that is why Defendant retained him on behalf of SES, Grigsby's knowledge does not demonstrate that Defendant did not engage in a conspiracy to conceal from those outside SES, including Grigsby, that the true cause of the tax liability was deliberate underpayment. Defendant's notes, reflected in Exhibit 101, spoke of a "conscious decision . . . to use tax dollars for other liabilities." A reasonable jury could have concluded that such a notation meant that Defendant knew about the tax underpayment, that he knew about the intentional use of tax dollars for other things, and that he was involved in concealing the intentional underpayment of taxes from the IRS and Grigsby. This is further supported by testimony from Dennis and Brian Lambka that Defendant's role in the conspiracy was to conceal the real cause of the underpayment of taxes from Grigsby. (D. Lambka Trial Tr. vol. II, 40-41, June 19, 2008; B. Lambka Trial Tr. vol. II, 61-62, June 19, 2008.)

Third, Exhibits 107 and 108, a draft definition of "co-employer," could have been considered by the jury to denote Defendant's efforts to further conceal from Grigsby and the IRS the true cause of the tax liabilities. The "co-employer" definition SES used prior to redrafting was vague and confusing. SES executives exploited this ambiguity to effect their Back-Out Plan so as to make it appear that the underpayment of taxes was an inadvertent result of accounting or record-keeping errors. A jury could have found that Defendant's com-

munication with Grigsby regarding the definition constituted further concealment of the actual cause of the tax liabilities. By revising the definition and sending the draft to Grigsby, the jury could have concluded that Defendant was directly participating in the conspiracy, in precisely the manner planned and later testified to by Dennis and Brian Lambka. (D. Lambka Trial Tr. vol. II, 40-41, June 19, 2008; B. Lambka Trial Tr. vol. II, 61-62, June 19, 2008.)

Fourth, a rational jury could have concluded from Exhibits 105 and 106, which include the Causes Document, that Defendant participated in the conspiracy to mislead the IRS. The document details the software and accounting problems which allegedly caused the underpayment of taxes. While Defendant maintains that he merely acted as a "scrivener" of this document and that Dennis Lambka drafted it, a reasonable jury could have found that Defendant was not simply a scrivener, but that, knowing about the falsification of tax returns, he nonetheless participated in misleading Grigsby and others outside SES with the presentation of the Causes Document. Such a conclusion, again, would fit the plan described at trial by Dennis and Brian Lambka.

In sum, the trial testimony and the documents and notes produced by Defendant could lead a rational jury to conclude that Defendant joined the conspiracy to defraud the IRS. Defendant has at most demonstrated that he knew about the falsified tax returns, that he hired Grigsby as outside counsel, and that Grigsby knew that SES had a tax liability. Furthermore, Defendant offers no substantial argument regarding insufficiency of the evidence; rather, he reargues the evidence and testimony presented at trial and second-guesses the

jury's determination regarding the same. Defendant has not demonstrated that, when viewing the evidence in the light most favorable to the Government, no rational trier of fact could have found him guilty beyond a reasonable doubt. Accordingly, the court will deny Defendant's motion for a judgment of acquittal.

B. Defendant's Motion for New Trial

Defendant also moves for a new trial pursuant to Federal Rule of Criminal Procedure 33. Defendant argues that errors by the court in determining the admissibility of evidence constitute reversible error and require a new trial. Defendant alleges that the court incorrectly (1) denied Defendant's motion *in limine* to exclude Defendant's own attorney work-product, (2) excluded attorney Grigsby's notes from evidence, and (3) refused to answer the jury's question regarding consideration of Defendant's status as SES legal counsel. The Government responds that (1) the crime-fraud exception permits admission of Defendant's attorney work-product, (2) Grigsby's notes were properly read into evidence, and (3) the court committed no error in referring the jury to the jury instructions rather than answering the jury's questions.

1. Standard

Rule 33 allows the court to "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). The Sixth Circuit gives trial courts broad discretion in determining whether to grant a new trial pursuant to Rule 33 because "'[t]he trial judge is in the best position to determine . . . appropriate for any demonstrated misconduct." *United States v.*

Wheaton, 517 F.3d 350, 361 (6th Cir. 2008) (quoting *United States v. Copeland*, 51 F.3d 611, 613 (6th Cir. 1995)). When a defendant rests his argument for a new trial on the basis of cumulative error, he must show that the "combined effect of individually harmless errors was so prejudicial as to render his trial fundamentally unfair." *United States v. Trujillo*, 376 F.3d 593, 614 (6th Cir. 2004) (citing *United States v. Parker*, 997 F.2d 219, 221 (6th Cir. 1993)) (finding only harmless error when a trial judge admitted hearsay statements of government agents); *see also Wheaton*, 517 F.3d at 361 (affirming a denial of a motion for new trial because no prejudice resulted from juror's misconduct in which the juror looked at a map to determine the distance between two towns).

2. Discussion

Defendant asserts that errors by the court in determining admissibility of evidence and how to answer jury questions combined to form cumulative error such that Defendant should be granted a new trial pursuant to Rule 33. (Def.'s Mot. New Trial at 1.) The Government responds that the court did not err regarding any of these decisions.

a. Defendant's Work-Product

Defendant first challenges the court's denial of his motion *in limine* to exclude Defendant's own notes as attorney work-product. (Def.'s Mot. New Trial at 2.) Defendant argues that the crime-fraud exception, invoked by the Government, was never sufficiently supported by the Government's witnesses at trial. (Def.'s Mot. New Trial at 5-6.)

In *Hickman v. Taylor*, 329 U.S. 495 (1947), the Supreme Court held that discovery rules did not support the relinquishment of an attorney's work-product to the opposing party. *Id.* at 510-11. The Court reasoned,

> [I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what [the attorney] considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests.

Id. Nonetheless, certain exceptions to this rule exist. One, the crime-fraud exception, removes from the work-product privilege "advice given with respect to ongoing or future wrongdoing." *In re Grand Jury Subpoenas 04-124-03 and 04-124-05*, 454 F.3d 511, 520 (6th Cir. 2006). "It is the purpose of the crime-fraud exception . . . to assure that the seal of secrecy between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime." *U.S. v. Zolin*, 491 U.S. 554, 563 (1989) (internal citations omitted). To demonstrate the applicability of the crime-fraud exception, the proposing party must "make a *prima facie* showing that a sufficiently serious crime or fraud occurred to defeat the privilege; second, the [party] must establish some relations between the communication at issue and the *prima facie* violation." *In re Antitrust Grand Jury*, 805 F.2d 155, 164 (6th Cir. 1986) (citing *In re Sealed Case*, 754 F.2d

395, 399 (D.C. Cir. 1985) ("The government satisfies its burden of proof if it offers evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud.")); *see also* 10 Federal Procedure § 26:203 ("It is a sufficient showing if the discovering party presents evidence that, if believed by a trier of fact, would establish the elements of some violation that was ongoing or about to be committed when the work product was prepared."). Nonetheless, "[t]o drive the privilege away, there must be something to give colour to the charge; there must be prima facie evidence that it has some foundation in fact." *Clark v. U.S.*, 289 U.S. 1, 15 (1933) (internal citations omitted).

Defendant argues that Dennis Lambka's testimony was insufficient to sustain the Government's assertion of the crime fraud exception. (Def.'s Mot. New Trial at 2.) The court disagrees. Dennis Lambka's testimony in fact provided the requisite evidence for the crime-fraud exception. In particular, Dennis Lambka testified about the tax fraud that SES executives planned and explained that they "were going to take the strategy that the systems and the software and the people within were to the major blame, for the deficiency with the taxes, and that Mr. Fisher would convey this to Latham and Watkins." (D. Lambka Trial Tr. vol. II, 40-41, June 19, 2008.) Without determining that Defendant's meeting notes in fact constituted attorney work-product, the court held that the notes were admissible under the crime-fraud exception.[3] Rather than addressing why

[3] Defendant argues that the court should not have admitted certain documents made before the Government alleges that Defendant joined the conspiracy, i.e., 1999; however, Dennis Lambka's trial testimony indicated that Defendant himself may have generated the idea for the

this testimony of Dennis Lambka's was insufficient to establish prima facie evidence of fraud, Defendant argues whether Dennis Lambka's testimony was or was not true. This, of course, is not a relevant inquiry for determining whether the crime-fraud exception applies in a particular case. *See In re Antitrust Grand Jury*, 805 F.2d at 164. Defendant's notes primarily consist of his communications with outside counsel Grigsby during the conspiracy. Because Defendant's alleged role in the conspiracy was to communicate a fabricated cause for SES's tax liabilities to Grigsby, these notes can be viewed as made for that purpose, and thus intended to further the conspiracy. This is sufficient to sustain the admission of the evidence under the crime-fraud exception. Therefore, it was not error for the court to admit this evidence, and the court will deny Defendant's motion as to this issue.

b. Grigsby's Notes

Defendant next alleges that physical copies of the notes of Grigsby should have been admitted at trial, either under Federal Rule of Evidence 803(6) or Federal Rule of Evidence 106. In response, the Government contends that Grigsby's notes were properly ruled inadmissible and that, in any case, Defendant could have asked Grigsby to read into evidence any portion of his notes, but did not.

Rule 803(6) allows admission of records of regularly conducted activity as an exception to the bar on hearsay evidence. Rule 803(6) permits those documents or records "in any form . . . if kept in the course of a regu-

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Back-Out Plan as early as 1997. (D. Lambka Trial Tr. vol II, 30, June 19, 2008.)

larly conducted business activity, and if it was the regular practice of the business activity to make the [record]." Fed. R. Evid. 803(6). Under the Rule, a properly submitted and authenticated business record is received into evidence, and the jury permitted to examine the document during deliberations. *See* Fed. R. Evid. 803(6). Defendant also alleges that it was error to exclude Grigsby's notes from evidence because of Rule 106, the "rule of completeness." Rule 106 states, "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Fed. R. Evid. 106. Any evidentiary decisions regarding admissibility of evidence are committed to the discretion of the district court. *United States v. McDaniel*, 398 F.3d 540, 544 (6th Cir. 2005).

Despite Grigsby's testimony regarding the regularity with which he takes and files notes, the court did not find that the notes satisfied Rule 803(6) and declined to admit them physically as business-records evidence.[4] Grigsby's notes were not of the type contemplated by the Rule, as notes prepared for litigation are not admissible. *See United States v. LaValley*, 957 F.2d 1309, 1314 (6th Cir. 1992) (upholding district court's finding

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[4] Defendant also argues that the notes are admissible for a nonhearsay purpose, namely, to identify that certain events occurred, who the participants were, and when certain meetings took place. Such purposes, however, were not argued at trial, and the court will not declare error now on such basis as additional arguments regarding relevance and prejudice, potentially requiring additional questions be put to Grigsby, would have certainly been made if this argument had been timely raised.

that because letters were not prepared for purposes of litigation, the letters were admissible under the records of regularly conducted activity exception to hearsay). Also, in *Palmer v. Hoffman*, 318 U.S. 109 (1943), the Supreme Court refused to validate and admit as a record of a regularly conducted business a railroad company's accident report where, even though litigation itself was not imminent, it was nonetheless possible. *Id.* at 111. The Supreme Court explained,

> [T]he fact that a company makes a business out of recording its employees' version of their accidents does not put those statements in the class of records made 'in the regular course' of the business within the meaning of the [rule]. If it did, then any law office in the land could follow the same course. . . . We would then have a real perversion of the rule designed to facilitate admission of records which experience has shown to be quite trustworthy.

Id. at 113.

Defendant here argues for precisely the "perversion of the rule" which the Supreme Court warned against: Defendant engaged Grigsby specifically for resolution of SES's tax liabilities with the IRS and now attempts to have admitted into evidence notes made by Grigsby during his preparation for such proto-litigation efforts. In addition, Defendant was not prejudiced by the exclusion from evidence of Grigsby's notes because Grigsby was nonetheless permitted to read the notes into the record as his recorded recollection. *See* Fed. R. Evid. 803(5). In this way, the court balanced traditional concerns regarding hearsay evidence with Defendant's desire to enter Grigsby's notes into evidence. When notes are read into the record as recollection recorded, the notes

themselves are not entered into evidence, *id.*, and the jury here did not have them to examine during deliberations. The court found that this result properly accounted for hearsay concerns while allowing Defendant to augment Grigsby's testimony with the notes. Exclusion of this evidence was not in error, and the court will deny Defendant's motion as to this issue.

As for whether the court should have admitted Grigsby's additional notes into evidence pursuant to Rule 106, this, too, is a question committed to the discretion of the district court. *Jamison v. Collins*, 291 F.3d 280, 387 (6th Cir. 2002). "Rule 106 is intended to eliminate the misleading impression created by taking a statement out of context . . . it is not designed to make something admissible that should be excluded." *United States v. Costner*, 684 F.2d 370, 373 (6th Cir. 1982). Thus, Rule 106 will not admit into evidence documents that are otherwise considered hearsay, as are Grigsby's notes. In addition, the court ruled previously that admission of material, including what Defendant now alleges was error for the court to exclude, gave rise to

> a substantial danger of confusing the jury with lengthy handwritten notes that are not relevant in every detail to the evidence already admitted. That substantial likelihood of confusion outweighs—substantially—any possible relevance that may exist within the subject papers. A relevant clause or sentence does not mean that the whole document is indispensable and non-confusing. Instead, there is a likelihood of danger that the evidence will be cluttered in a manner that will tend to distract the jury from intelligent consideration of salient proofs. Further, Defendant's own testimony and the argument of his

> counsel are adequate for presenting his view of the 'context' of the admitted evidence and the import of the conversations[']recorded notes. . . . Showing context is a matter for argument and presentation of the case that can be accomplished short of inundating the jury with more documents.

(7/01/08 Order (footnote omitted).) Defendant does not contest this consideration of the court, but rather focuses on the alleged necessity of having Grigsby's notes entered into evidence. Defendant, however, had the opportunity to have Grigsby read any portion of his notes into evidence pursuant to Rule 803(5) as recollection recorded.[5] Indeed, Grigsby did read some of his notes into the record as recollection recorded. The court's decision was not in error, and the court will not grant a new trial on this basis.

c. Jury Questions

Finally, Defendant argues that the court erred in declining to more specifically answer the jury's questions submitted during deliberations. The jury asked for instruction about the role of attorney-client privilege and a lawyer's possible duty to report illegal activities. (Def.'s Mot. New Trial at 21.) Specifically, the jury asked the following two questions: (1) "Do attorney/client privileges apply to [Defendant] in relation to his employment at SES?" (2) "If a legal counsel learns of il-

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[5] To the extent Defendant had chosen to do so, he would be the proposing, not "adverse" party relative to those notes, and would therefore have been prevented under Rule 803(5) from putting the notes physically before the jury. Fed. R. Evid. 803(5) ("If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.").

legal activities by his employer (if he is employed as their legal counsel) is the legal counsel legally required to report this to the appropriate authorities?" (7/03/08 Ans. to Jury Questions.) In response to Defendant's argument, the Government stated that the question regarding attorney-client privilege was not relevant to the count for which Defendant was convicted.

A district court has great discretion in responding to questions from a jury. *U.S. v. Young*, 553 F.3d 1035, 1050 (6th Cir. 2009) (quoting *United States v. Khalil*, 279 F.3d 358, 367 (6th Cir. 2002)) (finding no abuse of discretion when the district court reiterated the jury instructions to the jury in answer to their question). "Given that petitioner's jury was adequately instructed, and given that the trial judge responded to the jury's question by directing its attention to the precise paragraph of the constitutionally adequate instruction that answers its inquiry, the question becomes whether the Constitution requires anything more. We hold that it does not." *Weeks v. Angelone*, 528 U.S. 225, 234 (2000). "Similarly, a jury is presumed to understand a judge's answer to its question." *Id.* (citing *Armstrong v. Toler*, 11 Wheat. 258, 279 (1826)).

In answer to the jury's questions in this case, the court stated,

> [I]t is not necessary for you to hear the potentially complicated explanation that would be needed to accurately answer these two questions in order to correctly decide the issues and render a proper verdict.
>
> The law governing attorney-client privilege is not simple or easy to summarize. But the existence, if any, of an attorney-client privilege in the defendant's

> precise circumstances, and the scope and duration of such a privilege if it existed, need not be sorted out in order for the government to succeed in proving, or the defendant to raise defenses against, the conspiracy crimes alleged.

(7/03/08 Ans. to Jury Questions.) The court reiterates here what it held at trial: attorney-client privilege was not relevant to the count upon which Defendant was convicted. It is therefore irrelevant to the consideration of Defendant's motion for new trial. As to the jury's question regarding an attorney's duty to report illegal activities, the court was correct to decline to answer, as the instructions in this case were sufficient. Indeed, Defendant does not now challenge those. The court's answer to the jury's questions was proper under the circumstances, and the court will deny Defendant's motion as to this issue.

III. CONCLUSION

For the reasons stated above, IT IS ORDERED that Defendant's motion for judgment of acquittal [Dkt. # 76] is DENIED.

IT IS FURTHER ORDERED that Defendant's motion for new trial [Dkt. # 77] is DENIED.

/s/ ROBERT H. CLELAND
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE